82-1975

No.

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In The

Supreme Court of the United States

October Term, 1982

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, a Division of RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, an Unincorporated Association,

Petitioner,

vs.

YOLANDE ASSAD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIPSER, WEINSTOCK, HARPER, DORN & LEIBOWITZ
Attorneys for Petitioner
380 Madison Avenue
New York, New York 10017
(212) 867-2100

Questions Presented

1. Whether in an action brought by an employee against her former employer for breach of a collective bargaining agreement and against her union for breach of its duty of fair representation, the state statute of limitations governing actions to vacate arbitration awards, which United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), applied to determine the timeliness of the claim against the employer also determines the claim against the union?

2. If not, whether in such an action, the six-month limitations period contained in § 10(b) of the National Labor Relations Act determines the timeliness of the duty of fair representation claim against the union?

3. Whether, in a suit against a union the breach of its duty of fair representation the state statute of limitations governing actions to state arbitration awards, or the six-month limitation period contained in § 10(b) of the National Labor Relations Act governs the timeliness of the suit when the grievance is not submitted to arbitration?

List of Parties

In addition to the parties listed in the caption, Mount Sinai Hospital, Mount Sinai Services was a defendant in the district court and an appellee in the court of appeals.

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DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, a Division of the RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, an Unincorporated Association,

Petitioner,

v.

YOLANDE ASSAD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO ("District 1199" or "Union") hereby petitions for a writ of certiorari to the United States Court of Appeals for the Second Circuit, enabling this Court to review the judgment in Yolande Assad v. Mount Sinai Hospital, Mount Sinai Hospital Services, Leon J. Davis, as President, John Doe, Secretary-Treasurer of District 1199, National Union of Hospital and Health Care Employees, a

Division of the Retail, Wholesale and Department Store Union, AFL-CIO, an Unincorporated Association (C.A. 2, 1982 7251) (decided March 9, 1983).

Opinions Below

The opinion of the United States District Court for the Eastern District of New York is not officially reported and is reprinted as Appendix to this petition. The judgment of the District Court is reprinted as App. F. The Court of Appeals for the Second Circuit's opinion is not officially reported and is unofficially reported at 112 LRRM 3136 and is reprinted as App. A.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was issued on March 9, 1983 (App. C). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The statutory provisions involved are reprinted in App. G.

Statement of the Case[1]

The plaintiff, Yolande Assad, was employed by Mount Sinai Hospital as a laboratory

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1 Since the case is before the Court from the district court's granting of a motion to dismiss and the court of appeals' reversal of that dismissal, the "facts" set forth herein are those alleged in the complaint, which at this time must be assumed to be true.

technologist. She was granted a medical leave of absence which expired July 7, 1980. When Assad failed to report for work on that date she was sent a telegram from Mount Sinai informing her that unless she reported to work or contacted the Hospital by July 24, 1980, the latter would presume she had voluntarily resigned. When no word was received from Assad by the Hospital by that date, a letter was sent to her by the Hospital stating that its records would reflect her voluntary resignation as of July 7, 1980.

At some later date, but after the ten day period set forth in the collective bargaining agreement between the Hospital and District 1199, within which time the Union had to notify the Hospital in writing of its desire to contest a discharge,[2] Assad contacted

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2 The court below had before it a copy of the applicable collective bargaining agreement. It set forth in its decision the grievance and arbitration provisions contained in the contract. It did not refer to Article XXIX, which contains the procedure to be followed in discharge cases in addition to the pertinent sections of the grievance and arbitration provisions. Article XXIX provides:

"Discharge and Penalties

1. The Employer shall have the right to discharge, suspend or discipline any Employee for cause.

2. The Employer will notify the Union in writing of any discharge or suspension within forty-eight (48) hours from the time of discharge or suspension. If the Union desires to contest the discharge or suspension, it shall give written

the Union and informed it that she wished to contest her termination. She indicated that because of medical reasons she was unable to respond to the Hospital's communications.

The Union decided to file a grievance on her behalf. A meeting was held on October 9, 1980,

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(cont.)

notice thereof to the Employer within five (5) working days, but no later than ten (10) working days from the date of receipt of notice of discharge or suspension. In such event, the dispute shall be submitted and determined under the grievance and arbitration procedure hereinafter set forth, however, commencing at Step 3 of the grievance machinery.

If the Union notice of contest is given from six (6) to ten (10) working days after receipt of notice of discharge, the days beyond five (5) days shall be deemed waived insofar as back pay is concerned.

3. If the discharge of an Employee results from conduct relating to a patient and the patient does not appear at the arbitration, the arbitrator shall not consider the failure of the patient to appear as prejudicial.

4. The term 'patient' for the purpose of this Agreement shall include those seeking admission and those seeking care or treatment in clinics or emergency rooms, as well as those already admitted.

5. All time limits herein specified shall be deemed exclusive of Saturdays, Sundays and holidays."

attended by Assad and representatives of the Union and the Hospital. The Hospital informed the Union that it would not reinstate Assad. On October 15, 1980, the Union sent a letter to the Hospital indicating that it would proceed to arbitration if Assad was not reinstated. However, because the Union believed that Assad's claim lacked merit it decided not to proceed to arbitration and the Hospital's decision became final and binding fifteen business days pursuant to the terms of the collective bargaining agreement, subsequent to the conclusion of the grievance procedure.

It was not until June of 1980, eight months after her grievance was denied, that Assad, through her attorney, filed suit in the New York Supreme Court, Queens County. The complaint basically alleged that the Hospital had violated the collective bargaining agreement by discharging her without cause and that the Union had breached its duty of fair representation by failing to properly represent her. The action was removed to the United States District Court for the Eastern District and was assigned to Judge Bramwell.

The Union and the Hospital each moved to dismiss the complaint on the ground that the suit was time-barred. The district court granted the motions to dismiss, holding that New York's 90-day statute of limitations for vacating arbitration awards, N.Y. Civ. Practice Law § 7511(a) governed (App. G). Plaintiff appealed to the United States Court of Appeals for the Second Circuit.

That court held that United Parcel Service Inc. v. Mitchell, 451 U.S. 56 (1981), did not apply "where the employee's discharge claim was never arbitrated." (App. 9a). Rather it concluded that the six month limitations period contained in § 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C.

§ 160(b), was applicable to the action against the Hospital.

With respect to the pertinent statute to apply to the cause of action against the Union, the court held that it was bound by its prior decision in Flowers v. Local 2602 of the United Steelworkers of America, 671 F.2d 87 (2d Cir. 1982), cert. granted 103 S. Ct. 442 (1983), which held that fair representation claims "were more closely analogous to a malpractice dispute under state law." (App. A). Thus the Court applied the three year malpractice statute of limitations found in N.Y. Civil Practice Law § 214(b).

Nevertheless, the court recognized "the practical problems created by disparate limitations period where as here, the two actions are closely related." (Id. at 16a, n.3). Two of the judges noted that if they were not bound by Flowers they would apply the § 10(b) limitations period against both the Union and the Hospital. The entire panel indicated that it looked to the Supreme Court for guidance when it considered Flowers.

Reasons for Granting the Writ

1. The Appropriate State Limitations Period Issue and the § 10(b) Issue

This Court has already granted certiorari in Flowers and in DelCostello v. International Brotherhood of Teamsters, 679 F.2d 879 (4th Cir. 1982), cert. granted 103 S. Ct. 442 (1983), in which these issues were raised. Obviously if the Court decides that the applicable statute of limitations to be applied in a duty of fair representation case against a union should be either the applicable state arbitration statute

of limitations or § 10(b) of the NLRA, the decision below against the Union in this case was decided incorrectly and in conflict with Flowers and DelCostello. For that reason and for the reasons set forth in the petitions for certiorari in Flowers and DelCostello, which will not be repeated to minimize the burden on the Court, the Court should grant a writ of certiorari.

2. The Issue Pertaining to the Applicable Statute of Limitations When a Grievance Is Not Submitted to Arbitration

The Court below drew a distinction between those actions in which a grievance is submitted to formal arbitration and those which terminate when the Union decides not to proceed to arbitration. While a few other courts have taken that position, Byrne v. Buffalo Creek Railroad Company, 536 F. Supp. 1301 (W.D.N.Y. 1982); King v. Corn Products, 538 F. Supp. 569 (N.D. Ill. 1982), the overwhelming authority is to the contrary. See Bigbie v. Local 142, Int'l Bhd. of Teamsters, 530 F. Supp. 402 (N.D. Ill. 1982); Katz v. Mount Sinai Medical Center, __ F. Supp. __, 82 Civ. 1281-CLB (S.D.N.Y. 1982); Ross v. Bethlehem Steel Corp., __ F. Supp. __, 109 LRRM 2791 (D. Md. 1981); Field v. Babcock and Wilcox, __ F. Supp. __, 108 LRRM 3150 (W.D. Pa. 1981).

This question merits consideration by this court not only because of the conflict that exists, but also because there are a great many actions pending in the lower courts, in many of which this question will arise, and where the answer may lead to a disposition. Therefore, the Court should grant a writ or certiorari.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SIPSER, WEINSTOCK, HARPER,
DORN & LEIBOWITZ
Attorneys for Petitioner
380 Madison Avenue
New York, New York 10017
(212) 867-2100

Of Counsel:
Richard Dorn
Jerome Tauber

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 99—August Term, 1982

(Argued December 13, 1982 Decided March 9, 1983)

Docket No. 82-7251

YOLANDE ASSAD,

Plaintiff-Appellant,

—v.—

MOUNT SINAI HOSPITAL, MOUNT SINAI HOSPITAL SERVICES, LEON J. DAVIS, President, JOHN DOE, Secretary-Treasurer, DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, a Division of the Retail, Wholesale, and Department Store Union, AFL-CIO, an Unincorporated Association,

Defendants-Appellees.

Before:

OAKES, VAN GRAAFEILAND and MESKILL,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Bramwell, *J.*, dismissing the plaintiff's complaint as time-barred against both the employer and the union.

Affirmed in part, reversed in part and remanded.

YOLANDE ASSAD, Woodside, New York, *Appellant Pro Se.*

FLORAN L. FINK, New York, New York (Vincent Alfieri, Robinson, Silverman, Pearce, Aronsohn & Berman, New York, New York, of counsel), *for Defendant-Appellee Mount Sinai.*

RICHARD DORN, New York, New York (Jerome Tauber, Sipser, Weinstock, Harper, Dorn & Leibowitz, New York, New York, of counsel), *for Defendants-Appellees District 1199, et al.*

MESKILL, *Circuit Judge*:

In *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981), the Supreme Court was asked to determine the appropriate statute of limitations period in cases where an employee, after an unfavorable arbitration decision, brings a wrongful discharge action against his employer and a fair representation claim against his union, both pursuant to section 301(a) of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185(a) (1976).

The *Mitchell* Court found that at least as to the action against the employer, a wrongful discharge claim under the LMRA is analogous to a state action to vacate an arbitration award. Relying on its decision in *International Union, United Automobile, Aerospace & Agricultural Implement Workers (UAW), AFL-CIO* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), the Court concluded that an employee's post-arbitration wrongful discharge claim against the employer under section 301 is subject to the limitations period found in the relevant state arbitration statute.

In the action giving rise to the appeal before us, the United States District Court for the Eastern District of New York, Bramwell, *J.*, granted defendant's Fed. R. Civ. P. 12(b)(6) motion to dismiss the complaint. The court ruled that even though the appellant's discharge and fair representation claims were never arbitrated, it was nonetheless bound by *Mitchell* to apply the state arbitration limitations period. Judge Bramwell accordingly dismissed the appellant's claims against both the employer and union as time-barred under the ninety-day limitations period found in the New York State arbitration statute, N.Y. Civ. Prac. Law § 7511(a) (McKinney 1980). We are asked on appeal first to determine whether the *Mitchell* precedent should apply to unlawful discharge cases in the absence of an arbitration award, and second, whether *Mitchell* implicitly decided that fair representation claims against the union must also be governed by the limitations period found in the state arbitration statute.

We find that *Mitchell* is neither controlling nor persuasive where the employee's discharge claim was never arbitrated. The six month limitations period found in section 10(b) of the National Labor Relations Act

(NLRA), 29 U.S.C. § 160(b) (1976), is the more appropriate choice. Because appellant failed to bring her claim within the six month period, we affirm the district court's order dismissing her complaint against the employer, Mount Sinai Services-City Hospital Center at Elmhurst (Mount Sinai). In view of *Flowers* v. *Local 2602 of the United Steelworkers*, 671 F.2d 87 (2d Cir.), *cert. granted*, 51 U.S.L.W. 3404 (U.S. Nov. 29, 1982), we must hold that *Mitchell* does not control in fair representation actions brought against the union. In *Flowers* we concluded that a fair representation action under section 301(a) of the LMRA is most analogous to a malpractice claim brought under state law. We accordingly ruled that the three year limitations period found in the New York malpractice statute, N.Y. Civ. Prac. Law § 214(6) (McKinney Supp. 1982), governed the dispute. *Flowers* represents the law of the Circuit and we must follow it. Because appellant commenced her suit within the three-year period, we reverse the district court's order dismissing the complaint as time-barred against the union, District 1199, National Union of Hospital and Health Care Employees (District 1199), and remand to the district court for further proceedings.

BACKGROUND

For the purposes of deciding the legal questions raised by this *pro se* appeal, we will assume that the following factual statement is undisputed. Appellant Yolande Assad worked for approximately thirteen years as a laboratory technologist at Mount Sinai. During 1980, Assad was granted a medical leave of absence, effective to July 7, 1980. When Assad failed to report for work by that date the Assistant Director of Personnel at Mount Sinai sent

her a telegram indicating that the employer would presume that she had voluntarily resigned unless she reported for work or contacted the hospital by July 24, 1980. That date passed without word from Assad and the hospital sent her a letter stating that its employment records would reflect her voluntary resignation as of July 7, 1980.

At some point later in 1980, Assad informed District 1199 that she wished to contest the employer's decision to terminate her. Assad explained that she was undergoing medical treatment during July of 1980 and had been unable to respond to the hospital's inquiries. Assad indicated that she never intended to resign and that she wished to be reinstated to her former position. The union agreed to intercede on her behalf.

The collective bargaining agreement between District 1199 and Mount Sinai provided for a three-step grievance procedure to resolve disputes, and for binding arbitration if the dispute was not resolved through the grievance process.[1] In cases of employee discharge, the agreement

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1 The grievance and arbitration procedures outlined in the collective bargaining agreement provide:

ARTICLE XXXI

Grievance Procedure

1. A grievance shall be defined as a dispute or complaint arising between the parties hereto under or out of this Agreement or the interpretation, application, performance, termination, or any alleged breach thereof, and shall be processed and disposed of in the following manner:

Step 1. Within a reasonable time (except as provided in Article XXIX), an Employee having a grievance and/or his/her Union delegate or other representative shall take it up with his/her immediate supervisor. The Employer shall give its answer to the Employee and/or his/her Union delegate or other representative within five (5) working days after the presentation of the grievance in Step 1.

Step 2. If the grievance is not settled in Step 1, the grievance may, within five (5) working days after the answer in Step 1, be

stipulated that the parties should proceed immediately to step three, which requires the personnel director or ad-

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presented in Step 2. When grievances are presented in Step 2, they shall be reduced to writing, signed by the grievant and his/her Union representative, and presented to the grievant's department head or his/her designee. A grievance so presented in Step 2 shall be answered by the Employer in writing within five (5) working days after its presentation.

Step 3. If the grievance is not settled in Step 2, the grievance may, within five (5) working days after the answer in Step 2, be presented in Step 3. A grievance shall be presented in this step to the Personnel Director or Administrator of the Employer, or his/her designee, and he/she or his/her designee shall render a decision in writing within five (5) working days after the presentation of the grievance in this step.

Failure on the part of the Employer to answer a grievance at any step shall not be deemed acquiescence thereto, and the Union may proceed to the next step.

Anything to the contrary herein notwithstanding, a grievance concerning a discharge or suspension may be presented initially at Step 3 in the first instance, within the time limit specified in Article XXXI, Section 1.

Without waiving its statutory rights, a grievance on behalf of the Employer may be presented initially at Step 3 by notice in writing addressed to the Union at its offices.

2. All time limits herein specified shall be deemed to be exclusive of Saturdays, Sundays and holidays.

3. Any disposition of a grievance from which no appeal is taken within the time limits specified herein shall be deemed resolved and shall not thereafter be considered subject to the grievance and arbitration provisions of this Agreement.

4. A grievance which affects a substantial number or class of Employees, and which the Employer representative designated in Steps 1 and 2 lacks authority to settle, may initially be presented at Step 3 by the Union representative.

ARTICLE XXXII

Arbitration

1. A grievance, as defined in Article XXXI, which has not been resolved thereunder may, within fifteen (15) working days after completion of Step 3 of the grievance procedure, be referred for arbitration by the Employer or the Union to an arbitrator selected in accordance with the procedures of the American Arbitration Association. The arbitration shall be conducted under the Voluntary Labor Arbitration Rules then prevailing of the American Arbitration Association.

(footnote continued)

ministrator of the employer to render a decision within five business days after the grievance is presented.

On October 9, 1980, a meeting was held to consider Ms. Assad's grievance. In attendance were Assad, a union delegate, a union representative, and Doctors

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2. The fees and expenses of the American Arbitration Association and the arbitrator shall be borne equally by the parties.

3. The award of an arbitrator hereunder shall be final, conclusive and binding upon the Employer, the Union and the Employees.

4. The Arbitrator shall have jurisdiction only over disputes arising out of grievances, as defined in Section 1 of Article XXXI, and he/she shall have no power to add to, subtract from, or modify in any way any of the terms of this Agreement.

5. A grievance contesting a discharge may, within fifteen (15) working days after completion of Step 3 of the grievance procedure, be referred for arbitration to an arbitrator appointed by the American Arbitration Association from the Panel of twenty-six (26) arbitrators listed in Schedule B annexed hereto. Said arbitrators shall serve on the Panel for the period of one (1) year or until the termination date of this Agreement, whichever is sooner, and shall have jurisdiction only over grievances contesting discharges. The Association shall appoint said arbitrators in strict rotation order at the time it receives a request for the appointment of an arbitrator from the Panel in a discharge case. If an arbitrator so appointed is unable to hold a hearing in a particular case for any reason within one (1) month from the date of his/her appointment the Association shall appoint the arbitrator next in rotation, and so on. Should none of the arbitrators on the Panel be available within such one (1) month period, then the Association shall promptly (a) so notify both parties and (b) proceed to process the case pursuant to Section 1 of this Article XXXII, unless the parties consent to a later hearing date before the arbitrator so appointed. The fees of the arbitrators shall be borne equally by the parties. In the event of a vacancy in the Panel, the parties shall expedite the selection of an arbitrator to fill the vacancy or vacancies. If, at the expiration of the term of the Panel of Arbitrators the parties are unable to reach agreement as to arbitrators to serve thereafter, the parties shall select such arbitrators by each submitting a list of fifty-two (52) names and in turn striking such names until twenty-six (26) names remain.

Collective Bargaining Agreement Between League of Voluntary Hospitals and Homes of New York and District 1199, National Union of Hospital and Health Care Employees RWDSU/AFL-CIO 1980-1982, 44-47, *reprinted in* App. for Appellees at 25, 49-50.

Zilversmit and Gtzan from Mount Sinai. Although no formal written decision was issued after the meeting, the employer apparently informed the union that it would not reinstate Assad. Six days later, on October 15, 1980, District 1199 sent a letter to Mount Sinai stating that: "If this situation isn't rectified immediately and Ms. Assad reinstated, this matter will go to arbitration."

The union ultimately decided to forego arbitration on behalf of Assad, purportedly because her claim lacked substantial merit. There is no showing that the union ever communicated this decision to Assad. Pursuant to the terms of the collective bargaining agreement, the employer's discharge decision became final and binding fifteen business days after the grievance procedure was concluded.

In June of 1980, eight months after her grievance was denied, Assad, through her attorney, commenced an action in the New York State Supreme Court, Queens County. She alleged that Mount Sinai had violated the collective bargaining agreement by discharging her without good cause and that District 1199 had breached its duty of fair representation by failing to represent her interests zealously. The action was removed in July of 1981 to the United States District Court for the Eastern District of New York and was assigned to Judge Bramwell.

In an order dated March 3, 1982, Judge Bramwell ruled that Assad's claims against both the employer and the union were time-barred by the ninety-day limitations period found in the New York statute governing arbitration awards, N.Y. Civ. Prac. Law § 7511(a) (McKinney 1980). *Assad* v. *Mount Sinai Hospital*, 81 Civ. 2273 (E.D.N.Y. Mar. 5, 1982), *reprinted in* App. of Appellant at 4. Although the order did not explain the court's

reasoning, Judge Bramwell did state in open court on February 19, 1982, that he found "the instant case within the Mitchell holding for purposes of determining the applicable statute of limitations." Transcript of proceedings Feb. 19, 1982, *reprinted in* App. of Appellant at 18-19. This *pro se* appeal followed.

DISCUSSION

A. *Section 301 Claim Against the Employer*

In *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981), the Court focused on the appropriate limitations period where an employee, after an unfavorable arbitration decision, commences a section 301 unlawful discharge action against the employer and a fair representation suit against the union. The *Mitchell* Court analogized the employee's suit to an action under state law to vacate an arbitration award and accordingly ruled, at least insofar as the claim against the employer, that the action was governed by the three month limitations period found in the New York arbitration statute, N.Y. Civ. Prac. Law § 7511(a) (McKinney 1980). *Id.* at 61, 64.

The claims presented here are nearly identical to those raised in *Mitchell*—an aggrieved employee seeks redress under the LMRA, specifically charging that the employer violated the collective bargaining agreement when terminating her and that the union breached its duty of fair representation in connection with her discharge. The major distinction is that unlike *Mitchell*, Assad's grievance was never arbitrated. The district court ruled that the fact of arbitration was not controlling for purposes of determining the appropriate limitations period. Judge Bramwell reasoned that as long as a final and binding

decision was reached during the grievance process, the court would be bound by *Mitchell* to apply the limitations period found in the New York State arbitration statute. We do not agree.

Throughout the *Mitchell* opinion, the Court relied on the existence of an arbitration award. *See United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. at 61, 62 & n.4, 63-64. Indeed, it makes good sense to apply a short limitations period where the grievance has been arbitrated. The parties have enjoyed the advantages of a full, albeit informal, evidentiary hearing before an impartial decisionmaker, and the grounds for overturning the arbitration award on appeal are quite limited. *See John T. Brady & Co.* v. *Form-Eze Systems, Inc.*, 623 F.2d 261, 264 (2d Cir.), *cert. denied*, 449 U.S. 1062 (1980); *Wire Service Guild, Local 222, The Newspaper Guild, AFL-CIO* v. *United Press International, Inc.*, 623 F.2d 257, 260-61 (2d Cir. 1980). Moreover, the parties typically view arbitration as an expeditious means of resolving disputes that arise under the collective bargaining agreement, and the three month limitations period satisfies this objective.

Where the parties have not enjoyed the benefits of arbitration, a different case is presented. Indeed, the factual background of this case exposes the serious problems created by a very short limitations period where the union decides to forego arbitration. District 1199 notified Mount Sinai by letter dated October 15, 1980 that the union would commence arbitration proceedings on behalf of Assad if Mount Sinai persisted in its refusal to reinstate her. Although District 1199 apparently decided at some later point that Assad's grievance lacked merit and therefore should not be arbitrated, there is no claim that the union communicated its decision to Assad. Nor is it claimed that the union informed Assad that, for purposes

of appeal, her grievance would be deemed final and binding fifteen business days after conclusion of the grievance process.

The appellee would have us rule that even though Assad never enjoyed the advantages of a formal arbitration, and even though she was not privy to the union's decision to forego arbitration, we should nonetheless require her, within three months of the conclusion of the step three proceeding, to (1) ascertain whether her union actually intended to arbitrate the pending grievance; (2) determine when the employer's refusal to reinstate her became final and binding under the terms of the collective bargaining agreement; and (3) commence court proceedings. This judicially-imposed obligation is unnecessarily burdensome. The analogy between the treatment given Assad's grievance and a fully-arbitrated grievance is strained. On these facts there is no compelling reason to apply the state arbitration statute of limitations to a labor dispute that never reached arbitration.

We believe that the more appropriate limitations period is found in section 10(b) of the NLRA, 29 U.S.C. § 160(b) (1976), which provides a six month time bar for unfair labor practice actions commenced under the statute. Our conclusion, which is influenced by Justice Stewart's concurring opinion in *Mitchell*, 451 U.S. at 65, recognizes that a section 301 discharge claim does not closely resemble any state law action. In fact, to prevail against the employer, the aggrieved employee must not only prove a breach of the collective bargaining agreement, but must also demonstrate that the union breached its duty of fair representation. *See Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976). This is a uniquely federal cause of action which is properly governed by a federal limitations period.

There are three additional reasons why the section 10(b) limitations period makes good sense in non-arbitrated discharge cases. First, it reflects a judgment by Congress in a closely analogous context—*i.e.*, unfair labor practice actions commenced under the NLRA—that six months represents a proper accommodation between the employee's right to be heard and the important national interest in industrial peace. *See Local Lodge No. 1424, International Association of Machinists, AFL-CIO* v. *NLRB* (*Machinists*), 362 U.S. 411, 428 (1960). Second, and closely related, the six month period ensures that all labor disputes will be resolved expeditiously, thereby strengthening the "stability of bargaining relationships." *Id.* at 425, *quoted in United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. at 68 (Stewart, *J.*, concurring). In fact, the *Mitchell* Court in part premised its decision to apply the three month arbitration period by explaining that the alternative choice, a six year period for contract actions, would be unworkable:

> This system [collective bargaining process], with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later.
>
> . . . Given the choices present here, and the undesirability of the results of the grievance and arbitral process being suspended in limbo for long periods, we think the District Court was correct when it chose the 90-day period imposed by New York for the bringing of an action to vacate an arbitration award.

451 U.S. at 64.

Finally, the decision to apply *one* federal limitations period rather than looking to analogous, but potentially disparate state limitations periods ensures that all nonarbitrated employee grievances enter the federal courts on equal footing. The Supreme Court has recognized the strong "national interest in uniformity in industrial relations," particularly where the labor dispute implicates " 'those consensual processes that federal labor law is chiefly designed to promote—*the formation of the . . . agreement and the private settlement of disputes under it.*' " *Id.* at 66 (Stewart, *J.*, concurring) (quoting *Hoosier Cardinal*, 383 U.S. at 702) (emphasis added in *Mitchell*). Assad's claim directly challenges the "private settlement of disputes" under a collective bargaining agreement. She charges, in effect, that the grievance process "broke down" when acting on her claim. In these circumstances, a uniform limitations period is highly desirable. *See generally Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers* v. *Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

We recognize that the result reached here could be viewed to conflict with the admonition in *International Union, United Automobile, Aerospace & Agricultural Implement Workers (UAW), AFL-CIO* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), that the federal courts must look to the most closely analogous *state* statute of limitations when considering section 301 claims. We see no conflict with *Hoosier Cardinal*, for two reasons. First, the Court emphatically limited its holding to the precise claim presented in that case:

> The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for

> breach of contract cognizable at common law. Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question.

383 U.S. at 705 n.7.

Second, we are reminded that the federal courts will not apply a state limitations period where the options under state law would be inconsistent with national labor policy:

> But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. "Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 465. State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute.

Occidental Life Insurance Co. v. *EEOC*, 432 U.S. 355, 367 (1977). The options available under state law—the three month arbitration period and the six year contract period—do not advance the goals of the LMRA. The arbitration period, as explained earlier in this opinion, is unnecessarily short, and in any event it fails to satisfy the "analogy" test required by *Hoosier Cardinal*; a non-arbitrated grievance does not resemble a fully-arbitrated claim. The Supreme Court has intimated that the six year

contract period is similarly problematic. *See United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. at 64. In fact, the application of a six year period would encourage employers to arbitrate every grievance in order to limit their exposure to lawsuits to the shorter three month limitations period held applicable in *Mitchell*. The Supreme Court has cautioned in a similar context that the arbitration process becomes unworkable where increasing numbers of grievances are arbitrated:

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.

Vaca v. *Sipes*, 386 U.S. 171, 191-92 (1967) (footnote omitted); *see Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976).

We conclude that the six month limitations period found in section 10(b) of the NLRA is the best choice among the available options.[2] Because Assad failed to

---

[2] Justice Stevens has asked how the courts can apply the section 10(b) limitations period to unlawful discharge cases when there is no evidence of congressional intent to extend the section 10(b) period beyond unfair labor practice cases. *See United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 71, 75-76 & n.9 (Stevens, *J.*, concurring in part and dissenting in part). Our decision is not grounded on legislative intent, but rather reflects our considered judgment that the section 10(b) period is the most reasonable option available.

commence her action against the employer within the six month period, we affirm the order of the district court dismissing the complaint against Mount Sinai.

B. *Claim Against District 1199*

In *Flowers* v. *Local 2602 of the United Steel Workers*, 671 F.2d 87 (2d Cir.), *cert. granted*, 51 U.S.L.W. 3404 (U.S. Nov. 29, 1982), we explained that a fair representation claim against the union, although closely related to an unlawful discharge action brought against the employer, was qualitatively different. *Accord Newton* v. *Local 801 Frigidaire Local of the International Union of Electrical Workers*, 684 F.2d 401, 403 (6th Cir. 1982) (section 301 claim against union governed by six year limitations period for actions based on liabilities created by statute); *Hand* v. *International Chemical Workers Union*, 681 F.2d 1308, 1312 (four years), *reh'g en banc granted*, 681 F.2d 1308, 1313 (11th Cir. 1982). Specifically, we noted that unlike the discharge claim, the fair representation action "could not be resolved in the arbitration proceeding because it arose out of the conduct of that proceeding itself." *Flowers*, 671 F.2d at 89. Citing this distinction, we held that fair representation claims, rather than resembling state actions to vacate an arbitration award, were more closely analogous to a malpractice dispute under state law. This decision remains the prevailing law in our Circuit and we follow it here.

Because Assad commenced her action against District 1199 within the three year period found in the New York malpractice statute, N.Y. Civ. Prac. Law § 214(6) (McKinney Supp. 1982), we reverse the order of the district court dismissing her complaint against the union.[3] The

[3] We recognize the practical problems created by disparate limitations period where, as here, the two actions are closely related. *See United*

matter is remanded to the district court for consideration of the merits of Assad's claim.

Parcel Service, Inc. v. *Mitchell*, 451 U.S. at 66-67 (Stewart, *J.*, concurring in the judgment). Were we not bound by *Flowers*, Judge Van Graafeiland and the author of the opinion would be inclined to apply the section 10(b) limitations period against both the union and the employer on the basis that the reasons for adopting that period are more persuasive in fair representation actions. *See United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. at 67 & n.3 (citing those courts that have held that a union's breach of fair representation is an unfair labor practice under the NLRA) (Stevens, *J.*, concurring in judgment). Judge Oakes does not join us in this view. The entire panel looks forward to guidance from the Supreme Court when it considers *Flowers*.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 99 August Term, 1982

Decided March 9, 1983

Docket No. 82-7251

- - - - - - - - - - - - - - - - - - -X

YOLANDE ASSAD,

Appellee,

- against -

MOUNT SINAI HOSPITAL, MOUNT SINAI HOSPITAL SERVICES, LEON J. DAVIS, JOHN DOE, Secretary-Treasurer, DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, a Division of the Retail, Wholesale and Department Store Union, AFL-CIO, an Unincorporated Association,

Defendants-Appellees.

- - - - - - - - - - - - - - - - - - -X

Before: Oakes, Van Graafeiland and Meskill, Circuit Judges.

Order Amending Opinion

It is hereby Ordered:

That the opinion in the above-captioned case decided March 9, 1983 is amended as follows: "June of 1980" on line 16 at page 2286 is changed to "June of 1981."

/s/ James L. Oakes

James L. Oakes, U.S.C.J.

/s/ Ellsworth A. Van Graafeiland

Ellsworth A. Van Graafeiland, U.S.C.J.

/s/ Thomas J. Meskill

Thomas J. Meskill, U.S.C.J.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of March, one thousand nine hundred and eighty-three.

Present:

HON: JAMES L. OAKES

HON: ELLSWORTH A. VAN GRAAFEILAND

HON: THOMAS J. MESKILL

Circuit Judges,

YOLANDE ASSAD,	:	
Plaintiff-Appellant,	:	
v.	:	82-7251
MOUNT SINAI HOSPITAL, MOUNT SINAI HOSPITAL SERVICES, ET AL.,	:	
Defendants-Appellees.	:	

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in part and reversed in part and remanded to the said district court for further proceedings in accordance with the opinion of this court.

A. Daniel Fusaro,
Clerk

By: /s/ Edward J. Guardaro
Edward J. Guardaro,
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the third day of May, one thousand nine hundred and eighty-three.

YOLANDE ASSAD, Plaintiff,	No. 82-7251
- against -	
MOUNT SINAI HOSPITAL, Defendants.	

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Yolande Assad,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges

of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro,
Clerk

By: /s/ Francis X. Gindhart
Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

YOLANDE ASSAD, Plaintiff,	:	
- against -	:	81-C-2273
MOUNT SINAI HOSPITAL, Defendants.	:	

U. S. Courthouse
Brooklyn, New York

February 19, 1982
10:30 o'clock a.m.

B e f o r e:

HONORABLE HENRY BRAMWELL, U.S.D.J.

MARSHA DIAMOND
COURT REPORTER

EASTERN DISTRICT COURT REPORTERS
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201
852-7105

A p p e a r a n c e s :

SIMOAN & MILNER, ESQS.,
Attorneys for Plaintiff

By: MARTIN MILNER, ESQ.,
of Counsel.

SIPSER, WEINSTOCK, HARPER, DORN
& LEIBOWITZ, ESQS.,
Attorneys For Defendant
380 Madison Avenue
New York, New York 10017

By: JEROME TAUBER, ESQ.,
of Counsel.

ROBINSON, SILVERMAN, PEARCE,
ARONSOHN & BERMAN, ESQS.,
Attorneys for Mt. Sinai
230 Madison Avenue
New York, New York 10017

By: FLORA L. FINK, ESQ.,
of Counsel.

THE COURT: Sit down and I will put the Court's decision on the record.

Plaintiff Yoland Assad, brought this action against her former employer and her union, alleging breach of the Collective Bargaining Agreement and breach of the statutory duty of fair representation. Essentially, the plaintiff asserts that she was wrongfully denied a medical leave of absence and discharged in July 1980. Thereafter, she contacted the Union, which arranged for a meeting with the employer hospital which took place in October 1980. After the meeting, Mt. Sinai still refused to reinstate Ms. Assad. The Union informed the employer that the case would be taken to arbitration. Ultimately however, the case was not so taken. This lawsuit was commenced in July 1981.

The defendants have moved for dismissal of Ms. Assad's claims. They base their motions on a recent Supreme Court case, United Parcel Service v. Mitchell, which applied New York's six month statute of limitations governing actions to vacate arbitration awards to a plantiff's claims against a union and an employer under § 301 of the Labor Management Relations Act. In Mitchell, the employee's grievance was submitted to a joint panel which held a hearing and announced a decision adverse to the employee,

which was "binding on all parties" under the Collective Bargaining Agreement. The Court held the attack on this binding decision to be, and I quote, "more analogous to an action to vacate an arbitration award than to a straight contract action." The Court acknowledged that the ultimate claim against the employer sounded in contract. However, it found that the "indispensible predicate" to that action was a showing that the Union had breached the statutory duty of fair representation. Finally, the Court found that an unfair representation claim is "more a creature of labor law ... than it is of general contract law." Since national labor policy favors the rapid disposition of labor disputes and since the case was in the nature of an attack on an arbitration award, the Court chose the shortest applicable statute of limitations, that is, 90 days.

The defendants urge that this court too should, and indeed must, apply New York's 90 day state of limitations to the instant action. In the alternative, they argue that § 10(b) of the National Labor Relations Act, which provides a six month statute of limitations for filing unfair labor practice claims before the NLRB, should be chosen.

In order to avail themselves of the Mitchell holding, the defendants must show that a decision in the nature of an arbitration award was made in Ms. Assad's case. Such a decision need not be an actual arbitration award, but it must at least be a final and binding determination.

The defendants' first set of moving papers failed to allege that any such decision has been made. Perhaps realizing the defect in their argument, they submitted papers which explain more fully what transpired in October 1980. Specifically, the defendants assert, successfully I believe, that the October hearing was a "step 3" grievance proceeding within the meaning of Article XXXI of the Collective Bargaining Agreement, in that representatives of the

hospital and union and the plaintiff herself were present. This contention finds support in the letter of Mr. Boyland which refers to arbitration as the next step in the grievance procedure.

After the denial of reinstatement as a result of the Step 3 proceeding, the Collective Bargaining Agreement allows 15 working days to file an appeal after which the decision would be, and I quote, "deemed resolved" and not thereafter subject to the grievance and arbitration provisions" of the Agreement.

No appeal was filed. No other procedure under the Collective Bargaining Agreement was available. The determination was final. At that point, Ms. Assad became entitled to bring a § 301 action against the Union and the hospital. However, she did not do so until July 1981.

I find the instant case within the Mitchell holding for purposes of determining the applicable statute of limitations. In Mitchell, also, an "official" arbitration had not occurred. However, the Courts focused on the final and binding nature of the determination in concluding that the 301 suit was analogous to an action to vacate an arbitration award.

After considering the posture of Ms. Assad's grievance after October 1980 I must conclude that the same is true here. A decision was made after a hearing, however formal or informal. No appeal was taken, which made the decision final under the Collective Bargaining Agreement.

I find that in accordance with the Supreme Court's holding in United Parcel Service v. Mitchell, the 90 day statute of limitations provided by CPLR 7511(a) must be applied and plaintiff's claims dismissed. Therefore, the defendants' motions to dismiss are hereby GRANTED.

The parties are to settle an Order on Notice on or before March 5, 1982.

EASTERN DISTRICT COURT REPORTERS
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201
852-7105

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

YOLANDE ASSAD, Plaintiff,	:	81 Civ. 2273 (H.B.)
- against -	:	
THE MOUNT SINAI HOSPITAL, MOUNT SINAI HOSPITAL SERVICES, LEON J. DAVIS, as President, JOHN DOE, Secretary-Treasurer of DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, a Division of the Retail, Wholesale and Department Store Union, AFL-CIO, an Unincorporated Association, Defendants.	:	ORDER

Defendants Leon J. Davis, as President, John Doe, Secretary-Treasurer of District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (District 1199) by their attorneys, Sipser, Weinstock, Harper, Dorn & Leibowitz and defendant Mount Sinai Services - City Hospital Center at Elmhurst, a division of the Mount Sinai School of Medicine of the City University of New York, sued herein as defendants "The Mount Sinai Hospital" and "Mount Sinai Hospital Services" ("Mount Sinai"), by its attorneys, Robinson, Silverman, Pearce, Aronsohn &

Berman, having each separately moved this Court pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6) for an order dismissing the complaint herein as time-barred by the applicable state statute of limitation - - to wit the 90-day limitation period contained in CPLR § 7511 governing actions to vacate arbitration awards, and said motions having come on to be heard on February 19, 1982,

AND, upon reading and filing the notice of motion of District 1199 dated September 23, 1981, the affidavit of Jerome Tauber, Esq., sworn to September 23, 1981, the memorandum of law submitted on behalf of District 1199 dated September 1, 1981 and the reply memorandum of law submitted on behalf of District 1199 dated January 6, 1982, all in support of District 1199's motion; the notice of motion of defendant Mount Sinai dated November 9, 1981, the affidavit of Floran L. Fink, Esq., sworn to November 9, 1981, the memorandum of law submitted on behalf of defendant Mount Sinai dated November 9, 1981, the reply affidavit of Floran L. Fink, Esq., sworn to January 7, 1982, the reply memorandum of law submitted on behalf of defendant Mount Sinai dated January 7, 1982, and the supplemental affidavit of Floran L. Fink, Esq., sworn to February 8, 1982, all in support of defendant Mount Sinai's motion; the affidavit of Martin I. Milner, Esq., sworn to November 24, 1981, the memorandum of law submitted on behalf of the plaintiff dated November 24, 1981, the second answering affidavit of Martin I. Milner, Esq., sworn to January 14, 1982, all in opposition to the motions; and due deliberation, having been had thereon, and the decision of this Court having been made in open court on February 19, 1982,

NOW, on motion of Robinson, Silverman, Pearce, Aronsohn & Berman, attorneys for defendant Mount Sinai, it is

ORDERED, that the respective motions of defendants District 1199 and Mount Sinai to dismiss

the complaint herein as time-barred by the applicable state statute of limitation - - to wit the 90-day limitation period contained in CPLR § 7511 governing actions to vacate arbitration awards, be, and the same hereby are, granted in all respects.

E N T E R:

/s/ Henry Bramwell 3/5/82

U.S.D.J.

APPENDIX G

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, provides in pertinent part as follows:

Section 7 [29 U.S.C. § 157]:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 [29 U.S.C. § 158]:

Unfair Labor Practices.

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9 [29 U.S.C. § 159]:

Representatives and elections.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10 [29 U.S.C. § 160]:

Prevention of Unfair labor practices.

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency desig-

nated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 7511(a) of the New York Civil Practice Laws and Rules, CPLR § 7511(a) (McKinney), provides as follows:

> An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

Section 214(6) of the New York Civil Practice Laws and Rules, CPLR § 214(6) provides in pertinent part as follows:

The following actions must be commenced within three years: * * * *

> 6. an action to recover damages for malpractice; . . .

No. 82-1975

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

YOLANDE ASSAD,

Respondent.

V.

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES,

Petitioner.

BRIEF BY THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

YOLANDE ASSAD
PRO SE

QUESTIONS PRESENTED

1.

Whether this Court's decision in Del Costello v. Teamsters, which addressed only implicity and in dictum the applicable statute of limitations for duty of fair representation/ § 301 suits which are filed in connection with grievances not taken to arbitration, should be applied retroactively to bar a suit over a grievance not taken to arbitration which was filed within the statutory period applicable at the time suit was filed?

2.

Whether, if Del Costello is to be applied retroactively, the statutory period beigns to run before the union advises the employee that her grievance will not be taken to arbitration?

BRIEF OF YOLANDE ASSAD IN OPPOSITION

This statement is submitted in opposition to Local 1199's, the Petitioner herein, request for Writ of Certiorari.

Local 1199 argues that this Court should review the decision of the Court of Appeals because of their claim that a 6 month Statute of Limitations is applicable. A review of all the cases decided to date, however, indicate that a 6 month Statute of Limitations has not been found applicable in cases containing the facts of this proceeding.

A review of the record below indicates that the Union never held an arbitration proceeding or any type of formal proceeding on behalf of Yolande Assad. The record is completely devoid as to whether or not any type of real grievance was entertained by the Union inasmuch

as the Trial Court never had a hearing so as to accurately determine what actually happened. It is clear, however, that there was no arbitration or formal proceeding ever held in this case.

Most important, it is absolutely clear from the record below that the Union never informed Yolande Assad that it was not going to take this matter to arbitration. In fact, a review of the record below indicates that the Union told Ms Assad that they <u>were</u> going to take it to arbitration but then never told her that they changee their mind. All these arguments were raised in the Court of Appeals and in the District Court as are indicated by the papers filed below.

It is clear from the above that due to the facts stated herein this case

is not controlled by previous decisions and thus this Cout should deny Writ of Certiorari.

If This Court Grants Certiorari, It Should Remand The Case To The District Court For Purposes Of Determining When The Statute Of Limitations Began To Accrue

The Court of Appeals did not have to address the issue of accrual since it utilized a 3 year Statute of Limitations. If this Court, however, should choose to accept a 6 month Statute of Limitations, the issue of accrual becomes very important. As raised in the District Court and in the Appeals Court, it is Yolande Assad's position that the cause of action against the Union could not have accrued until the Union notified her that there would be no arbitration. It is Yolande Assad's position in the

Courts below that once the Union told her that it was going to arbitrate the matter, she had every reason to rely on that representation. She in fact waited patiently for that arbitration and was never told that the matter was not going to arbitration. When she finally brought her law suit, it was, of course, over 6 months from the date of the origical termination, but it is Yolande Assad's position that the Statute of Limitations was tolled since the cause of action could not accrue until Ms. Assad knew she had something to sue about. The issue of accrual is vital since without mandating a Union to let its members know affirmatively that they are not going to arbitrate a matter (particularly after they stated in

writing that they are going to arbitrate her matter), a Union could always avoid its obligation by simple holding out for a 6 month period and misrepresenting the status of its case to its members.

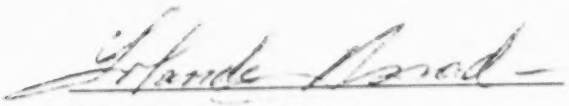
From the above, it is clear that a hearing must be held on the issue of Accrual so that the date of accrual of this cause of action can be ascertained.

The Del Costello v. International Brotherhood Of Teamsters Case Should Not Be Given Retroactive Affect

It is finally submitted that the Writ of Certiorari should be denied since at the time this action was commenced, the appropriate Statute of Limitations against the Union was 3 years. It is improper to apply the Del Costello decision retroactively to this matter.

Therefore, certiorari should be denied.

Respectfully submitted,



YOLANDE ASSAD

Pro Se

40-11 72nd Street, Apt. 6G
Woodside, New York 11377
(212) 335-9779

AFFIDAVIT OF SERVICE

YOLANDE ASSAD, being duly sworn, deposes and says:

On this date I served copy of BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI upon the below mentioned attorneys, who are the attorneys for 1199 Union in the herein action by placing copies of same in an official United States Post Office Depository.

YOLANDE ASSAD

Sworn to before me this
20th day of September 1983

RAMIRO RODRIGUEZ
NOTARY PUBLIC
No. [illegible]
Qualified in Queens County
Commission Expires March 30, 19[illegible]

TO: Sipser, Weinstock, Harper,
Dorn & Leibowitz
Attorneys for Defendant
District 1199
380 Madison Avenue
New York, New York 10017